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In the

Supreme Court of the United States

October Term, 1971

No. 71-1553

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

John J. Gilligan, Governor of Ohio,
Dana L. Stewart, Adjutant General of Ohio,

—and—

Robert H. Canterbury, Assistant Adjutant General,
Petitioners,

—against—

Craig Morgan, Thom Dickerson,

—and—

William Slocum,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Opinion Below

The opinion of the Court of Appeals is reported at 456 F.2d 608, as *Morgan* v. *Rhodes*.

Counterstatement of Questions Presented

1. Whether the majority of the Court of Appeals erred in reversing the District Court's dismissal of the complaint when it concluded that the complaint alleged deprivations

of constitutional rights and that, if the allegations were proved, some form of relief might be appropriate.

2. Whether the political question doctrine precluded a Court of the United States from inquiring into conduct of the National Guard of a State, including the question whether conduct of the National Guard, its officers or its supervisors, has deprived persons of rights, privileges, and immunities secured by the United States Constitution.

Counterstatement of the Case

It is the position of Respondents that the opinion of Judge Edwards for the majority of the Court of Appeals adequately and effectively summarizes the allegations of the complaint and correctly isolates the issues. The Court's opinion quotes the pertinent portions of the complaint.

REASONS FOR DENYING THE WRIT

This action results from a major event in recent American history. On May 4, 1970, Ohio National Guard troops fired into a crowd of students and young persons on the campus of Kent State University, killing four and wounding several others. Not long afterward, the plaintiffs, students of Kent State University, filed this class action, alleging constitutional deprivations of the most serious magnitude and seeking injunctive and declaratory relief for the purpose of assuring that such an event does not occur again. In substance the complaint alleges that the shootings on the Kent State University campus were the result of a series of unconstitutional practices and that such practices and their result deprived the persons killed

and injured of life and liberty without due process of law and threatened the same to other members of the class. *Screws* v. *United States,* 325 U.S. 91 (1945). The action is premised on the capacity of a United States District Court, acting as a court of equity, under Title 42, United States Code, Section 1983, to grant relief to prevent further deprivations of constitutional rights. Nevertheless, the District Court dismissed the complaint without opinion, thereby holding that the federal courts are closed to litigants seeking the most basic kind of relief.

If this case were coming before this Court in that context, it would be eminently suited for the issuance of a writ of certiorari. Such a decision would have conflicted with the long established rule that a complaint should not be dismissed unless no set of facts could be proved warranting some relief. See, e.g., *Jenkins* v. *McKeithen,* 395 U.S. 411 (1969); *Conley* v. *Gibson,* 355 U.S. 41 (1957). It would also have extended the political question doctrine (if that were the ground of decision) to an area in which it had never been applied—relations between the federal judiciary and the states. See *Baker* v. *Carr,* 369 U.S. 186 (1962). Moreover, the District Court had denied a judicial forum in a case of great public importance.

But that is not the context of the petition. The Court of Appeals reversed the District Court, as it had to, rendering the case quite inappropriate for issuance of a writ of certiorari. In its present context, this case merely reiterates a long-standing interpretation of the Federal Rules of Civil Procedure. There is no conflict between the decision of the Sixth Circuit and those of the other Circuits. And the decision of the Court of Appeals—unlike the decision of the District Court—was not novel although

it was important. It was merely a correct application of procedural law.

Moreover, it was a decision of an interlocutory nature, remanding the case to the district court for further proceedings. Any issues, other than the simple conclusion that the complaint states a claim for relief, can return to this Court within a factual record if this case proceeds, as it should, to resolution after trial. As it has in the past, this Court should deny the writ because the case is neither final nor ripe for Supreme Court consideration. See, e.g., *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *United States*, 240 U.S. 251, 258 (1916); *R. Stern and E. Gressman*, Supreme Court Practice 180 (4th ed. 1969).

Similarly, the "Political Question" contention offered by petitioners does not warrant issuance of the writ consistently with the criteria normally applied by this Court. The Court of Appeals' rejection of the suggestion that the political question doctrine immunizes National Guard conduct from judicial inquiry conflicts neither with decisions of this Court nor of other Circuits. In fact, the Court of Appeals' conclusion is a direct consequence of this Court's holding in *Baker* v. *Carr*, 369 U.S. 186 (1962), that the political question doctrine deals with "the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States . . ." 369 U.S. at 210. See also 369 U.S. at 218, 226. And, of course, this Court long ago established the principle that civilian courts could inquire into the lawfulness of conduct of the armed forces and the militia. See, e.g., *Duncan* v. *Kahanamaku*, 327 U.S.

304 (1946); *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

An additional point of importance in connection with the claimed application of the political question doctrine to this case is that such a claim was never made in the District Court. The motion to dismiss proceeded on the ground that the State of Ohio was voluntarily in the process of seeking non-lethal weapons for its National Guard troops, on the ground that the United States was an indispensable party, and on the ground (not in issue on this petition) that an order enjoining premature use of National Guard troops would be an unwarranted interference with state government. Applicability of the political question doctrine to this case was not suggested until appeal.

CONCLUSION

There is no necessity at this stage of this case for issuance of a writ of certiorari. On the contrary, the interests of justice would best be served by permitting this case to proceed to trial as quickly as possible. Thereafter, remaining issues of moment may be considered by this Court. The petition should therefore be denied.

Respectfully submitted,

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